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Supreme Court of the United States

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Respondents and their *amici* strive to evade facing the only question upon which the Court granted this Petition. They seek to obfuscate with extraneous questions and hyper-technical pleading arguments which are not appropriate either at this stage, *see Scheuer v. Rhodes*, 416 U.S. 232, 235-36 (1974) or at all, *see Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). They seek a *per se* rule that the anti-discrimination requirement imposed by §510 of ERISA, 29 U.S.C. §1140, may never be applied to a "change of operations" resulting in discharge of protected employees, even where an employer changes its operations specifically to interfere with attainment of benefits. Such a rule would directly conflict with the clear language of §510, the holdings of the Third and Seventh Circuits[1] under §510, and the guiding principles of ERISA's purpose and Congressional intent elucidated in *Varity Corp. v. Howe*, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). Such a rule would be contrary to the Court's interpretation of every other anti-discrimination law passed by Congress.

Respondent Santa Fe made no "change of operations" in any meaningful sense of that phrase. They did not stop moving containers through their inter-modal system, nor did they "downsize". ATSF continued to conduct its inter-modal business at the Hobart Yard in Los Angeles, using the same cranes and equipment. The only change Santa Fe made was for ATSF to enter into a "contract" with its wholly owned subsidiary SFTS just weeks before it unilaterally canceled that "contract" with SFTS. In March 1991, ATSF then awarded again its inter-modal work subcontract. The "contract" went to ITS to avoid paying benefits to the Teamsters-represented employees at contractually defined levels which the railroad and its wholly owned subsidiary had agreed to

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[1] *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987) and *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983). *Compare Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995). Even the *Andes* court declined to hold that a change of operations can never as a matter of law implicate §510 liability. *Id.* at 1338.

abide by. Under the Complaint Respondents' conduct was no innocuous "change of operations" but a purposefully designed scheme to reduce the level of employer contributions for benefits set by a valid CBA and federal law, the Multiemployer Plan Act, 29 U.S.C. §1145.

Petitioner alleged termination with the specific intent of depriving of retirement, pension and health and welfare benefits (Pet. Writ. App. IV at 24a-30a). Because the plans, including the health and welfare benefit plan, were "multiemployer" plans (Santa Fe Br. at 8), *see* ERISA §515, Santa Fe could not have unilaterally amended or canceled it as Respondent ITS admits (ITS Br. at 19) ("SFTS could not unilaterally amend or terminate this health plan"). The 1980 amendments to ERISA, including §515, mandated that employers make all required contributions to a multiemployer plan. Engaging in "any transaction" which has as its "principal purpose ... to evade or avoid liability" under a multiemployer plan, incurs liability under ERISA §4212(c), 29 U.S.C. §1392. Other ERISA provisions would have prevented Santa Fe from withdrawing from any of the Teamsters' ERISA-protected plans covering this group of workers who were singled out among all the many workers in an enormous railyard for such treatment. To avoid obvious liability under ERISA Santa Fe in concert with ITS devised a sham subcontract for the inter-modal work, terminated all Teamsters employed in the yard, and lowered the level of employee benefits paid them after they (for the most part) had been rehired.

The Railroad Respondents[2] **concede** that the rationale of the Ninth Circuit's ruling on which this Court granted its Writ of Certiorari was wrong as a matter of law. Their telling concession that the "plain language of Section 510 would apply in cases where an employer takes action to prevent a participant from becoming eligible for welfare benefits" (Santa Fe Br. at 28), is well-nigh

[2] Petitioner uses the terms "Railroad", "Railroad Respondents" and "Santa Fe" to include The Atchison, Topeka & Santa Fe Railway (ATSF) and its wholly-owned and controlled subsidiary Santa Fe Terminal Services (SFTS). Those Respondents jointly filed one brief.

dispositive. Respondents' *amici* do not even seek to justify the court of appeals' opinion on its stated grounds.

Respondents' arguments fail the test of simple logic and consistency. They failed to petition for certiorari; they did not otherwise contest the Ninth Circuit's holding that Petitioner stated a pension interference claim under §510 by alleging that ATSF changed its operations and fired the SFTS employees for the purpose of interference. Now that they are here, however, Respondents argue that the same discharge undertaken for an additional motivation of discriminating against health and welfare benefits, is not actionable under §510 because they made a "change of operations". There appears only one difference between Petitioner's two §510 claims – one involves pension benefits and the other health insurance and welfare benefits. Respondents **repeatedly concede** that §510 prohibits interferences with **both types of benefits** (Santa Fe Br. at 10, 15, 19, and 28).

ARGUMENT

I.

NO EMPLOYER'S CHANGE OF BUSINESS OPERATIONS WHEN TAKEN FOR THE PURPOSES OF RETALIATION OR INTERFERENCE WITH THE ATTAINMENT OF RIGHTS UNDER A HEALTH AND WELFARE BENEFIT PLAN IS IMMUNE FROM SUIT UNDER §510 OF ERISA.

Respondents and their *amici* ask this Court to engraft on this clearly drafted statute a judicially created exception to §510 liability that will encompass anything called a "change of operation". They urge no employer would ever violate §510 of ERISA for subcontracting out work, creating a subsidiary, or closing a portion of its operations **even when** doing so for the purposes of retaliating against or interfering with its employees' contractual right to receive health and welfare benefits at a particular level, for a definite duration or until a proper plan amendment. Their reasoning would permit employers to make the same "changes of operations" for the

purpose of avoiding pension obligations. Obviously their proposal would eviscerate the broad remedial effects of ERISA and undermine this Court's ruling in *Ingersoll Rand v. McClendon*, 498 U.S. 133, 111 S.Ct.478, 112 L.Ed.2d 474 (1990).

Respondents and its *amici* can point to no language in the statute or any legislative history in support of their proposed exception to §510 liability. Congress presumably considered such a reading of its language unacceptable, and clearly it did not speak to this specific issue in discussing §510.[3] One of the House Reports, however, declared that underlying ERISA was Congress'

> **recognition of the necessity for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, ... but also with the broad spectrum of questions such as ... plant shut downs and plan terminations**...

H. Rep. No. 533, p.9-10, 93rd Cong., 2d Sess., *reprinted in* 2 Legislative History of the Employment Retirement Income Security Act of 1974, at 2356-75 (Sen. Com't. Print) (hereinafter "Leg. Hist.") and 1974 U.S. Code & Cong. Admin. News at 4647-48 (hereinafter

[3] Respondents' *amici* claim that "none of this legislative history directly addresses whether §510 was intended to prohibit an employer's consideration of benefits costs in taking actions that result in terminations of employment" (*Amici Curiae* Natl. Assoc. Of Mfr. And Assoc. Of Am. Railroads Br. at 15, hereinafter "Resp. *Amici* Br."). Respondents note that the Senate bill originally reported out of committee did not cover employee welfare benefit plans but Congress added protections for those benefits in the final bill signed by President Ford (Santa Fe Br. at 21-25). In reference to §510 Respondents point out that "Senator Williams stated that the legislation contains a 'further protection for employees' insofar as it 'prohibits discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with the attainment of vested benefits **or other rights under the bill**'" (Santa Fe Br. at 27) (emphasis supplied). These statements are persuasive evidence that Congress intended to regulate against retaliation and interference with health and welfare benefits.

"U.S.C.C. & A.N.") (emphasis added). In their discussions of the legislative history of ERISA Respondents and *amici* ignore this statement of Congressional intent to broadly reach employer efforts that interfere with promised benefits, even changes of operations such as "plant shut downs".

Moreover, Congress broadly worded the statute to prohibit the "discharge" of employees or actions which "discriminate against" employees "for exercising any right" under a plan "or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan". The latter phrase plainly means that Congress intended that §510 prohibit only improperly motivated employer actions.

Petitioner pleaded that Respondents' conspiring to form a sham contract on this part of the inter-modal work with a new employer was taken for the specific purpose of reducing the employees' health and welfare, pension and retirement benefits, all fixed by contract or law. Inasmuch as Petitioner plead an improper motive for Respondents' actions their Complaint states a *prima facie* claim under §510. *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994) (§510 plaintiff has a "very low threshold in establishing a *prima facie* case under ERISA").[4]

In their argument for a "change of operations" exception to ERISA liability Respondents and their *amici* conspicuously omit any discussion of this Court's recent decision in *Varity Corp. v. Howe*, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). The Court held that the employer violated ERISA-imposed fiduciary duties by creating a

[4] Respondents point out that Petitioner pleaded multiple motives – each related to reducing employee benefits – for the subcontracting and mass discharge (Santa Fe Br. at 28 n. 15). That ERISA protected only some of the benefits interfered with by Respondents' acts, excluding the Railroad Retirement benefits, does not defeat their liability under §510. In Title VII cases this Court has ruled that an employer's "mixed motives" do not obviate liability. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The Court may apply this same principle to the similarly worded language of ERISA.

"business plan" which "amounted to placing many of Varity's money-losing eggs in one financially rickety basket" all for the purpose of releasing Varity of its obligation to provide health and welfare benefits. 116 S.Ct. at 1068. Varity accomplished this through what appeared on its face as a "normal" change of operations.

Varity should have laid to rest any notion that an employer's change of operations is *per se* immunized from ERISA liability. No conceptual purpose differs between §404 and §510 as both statutes prohibit employer actions taken for the purpose of reducing health and welfare benefits. Indeed more so than §404, §510 specifically prohibits actions which interfere with the employment relationship ("discharge, fine, suspend, expel, discipline, or discriminate"). Respondents' failure to distinguish *Varity* is as close to a tacit admission of intellectual bankruptcy as this Court can expect any litigant to make, except for ITS' claim (ITS Br. at 24-25) that this group discharge was a plan amendment.

Not one of the circuit court decisions cited by Respondents and their *amici* in support of their argument hold as a matter of law that §510 can or should never apply to an employer's change of operations. Each court cited by Respondents and their *amici* on the change of operations issue decided the case at the summary judgment stage, after discovery and much evidence of specific intent and legitimate business motivation had been adduced. *See Andes v. Ford Motor Co., supra,* 70 F.3d at 1336 (noting that five of the six circuits to address the question whether a corporate organizational change, like selling a subsidiary, violated §510 "rejected such claims at the summary judgment stage"). The cases cited by the *Andes* court were decided prior to the *Varity* decision. *Varity* made clear that an employer's business plan changing its operational structure as part of a scheme to affect health and welfare benefits could violate ERISA.

The Railroad Respondents and their *amici* heavily rely upon the D.C. Circuit's *Andes* decision. Even that case did not rule out the employees' allegations under §510 on the pleadings. The *Andes* court declined to hold as a matter of law that §510 of ERISA never would apply to an employer's change of operations: "This is not to

say that §510 could never be implicated in a company's basic organizational decision". *Id.* at 1338. That court of appeals went on to state that a sale or closure of entire unit of a business **could** violate §510 if the employees could show that many of the employees in the company unit were soon to become eligible for benefits and the employer knowing this decided to shut down or sell the unit. *Id.* Here, the Railroad did not sell its inter-modal business or shut down the Hobart Yard but continued the same work in the same place while breaking out of the existing CBA and reducing the contractually defined level of benefits. ITS did not bring in new tools or computers to do the inter-modal work. It even used Santa Fe's cranes and most all the same employees. The only "efficiency" ITS offered Santa Fe was to reduce the level of employee benefits. Respondents' specific intent to interfere with employee benefits appears on the face of this sham transaction.

Other circuit courts have found that under particular facts an employer's change of operations did violate §510 because the specific intent or illegal motivation element was met. In *Gavalik v. Continental Can Co., supra,* the Third Circuit, Chief Judge Higginbotham writing, held that the employer's plan to reduce its pension liabilities by transferring work to other plants and closing down entire plants that had numerous employees who were about to attain vesting status violated §510. 812 F.2d at 841. In *Kross v. Western Electric Co., supra,* the Seventh Circuit held that an employer violated §510 by discharging large groups of employees as part of an ostensible workforce reduction because the court found that the real motive for the layoffs was to "avoid continuing to make payment for [their] company-provided life and medical insurance". 701 F.2d at 1239. The salient point is that courts must decide each §510 case, just as in other employment discrimination claims, on its particular facts to determine whether a plaintiff has pleaded and proven the "purpose" or motivation or specific intent element of the cause of action. *See, e.g., Price Waterhouse, supra* and *Dyrt v. Mountain States Tel. & Tel.*, 921 F.2d 889, 896 (9th Cir. 1990) (courts "must be particularly cautious when reviewing a district court's decision to grant summary judgment where issues of intent or motivation are involved").

Respondents' argument that §510 can never apply to an employer's change of operations motivated by an intent to reduce the level of health and welfare benefits guaranteed for a term of years fails from internal illogic. If Respondents were correct about the immateriality of an improper health and welfare benefits motivation as applied to a group of employees, then the same logic would deprive employees of a §510 claim when their employer changes operations for the purpose of depriving them promised future pension benefits. Respondents did not, however, petition for certiorari on that part of the Ninth Circuit's ruling upholding Petitioner's §510 claim against Respondents for interfering with the employees' Teamsters pension benefits in the same "change of operations" (Writ. App. IV at 8a). Respondents' argument suffers from terminal cynicism; they would require this Court to overrule its 1990 decision in *Ingersoll-Rand v. McClendon, supra.* To uphold Respondents' plea that the Court graft a new exception onto the statute, this Court would have to produce an anomalous interpretation of the scope of §510 inconsistent with the law's clear language.

II.

PETITIONER PROPERLY ALLEGED THAT RESPONDENTS WERE MOTIVATED BY THE REQUISITE SPECIFIC INTENT TO INTERFERE WITH THE EMPLOYEES' HEALTH AND WELFARE BENEFITS.

Respondents, and especially their *amici*, argue that an employee can never "show" the requisite "specific intent" to interfere with the attainment of plan benefits where the only motivation for the employment termination was to save the employer the "normal costs of a participant's future benefits" (Resp. *Amici* Br. at 4, 10-11).[5]

[5] Courts have interpreted the ADEA to prohibit employers from discharging or discriminating against employees in the protected group because those employees cost more to hire or retain in employment. *See, e.g., Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1205 (7th Cir. 1987). Congress designed ERISA to provide rights to employees "like the [NLRA], the wage-hour laws, and other labor standards laws". 2 Leg. Hist. at 2356 and 1974 U.S.C.C. & A.N. at 4647.

Read in the context of this case, that argument has no support in the language or the history of the statute, and neither Respondents nor its *amici* cite to any. This case does not present facts where the CBA providing benefits had expired and the employer was determining what benefit package it could afford. Of course, in that instance an employer legitimately could consider the costs of providing benefits. Similarly, no allegation has been made that the Railroad Respondents had a unilateral right, by contract or law, to modify the multiemployer plan which set the level of benefits for a particular term. Indeed, Congress compelled employers in a multiemployer plan to make all contributions required by the CBA. ERISA §§515 and 4212(c). This Court explained that

> [t]he legislative history of these provisions explains that Congress added these strict remedies to give employers a strong incentive to honor their contractual obligations to contribute and facilitate the collection of delinquent accounts

under multiemployer plans. *Laborers Health & Welfare Trust v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 547, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988).

In this case Petitioner pleads that Respondents' motivation for the subcontracting was a unilateral reduction in the level of benefits promised to the employees in the multiemployer plan.[6] Respondents did so by concocting a business plan to suddenly award a contract to SFTS for the inter-modal work (the first ever contract between ATSF and SFTS after SFTS had performed the same work for dozens of years), cancel that "contract" a few weeks later, and enter into a conspiracy with ITS to take over the work but to offer the employees a decreased package of benefits. Under the applicable CBA and federal law (including the NLRA, *see* ITS Br. at 10)

[6] Respondents' *amici* nearly concede that discharging employees to achieve large benefit cost savings evidences the necessary specific intent under §510: "[t]he fact that the employer's benefit cost savings may be greatly multiplied if many employees are terminated raises the specter of a greater motivation related to benefit costs" (Resp. *Amici* Br. at 10).

Respondents had no right to unilaterally reduce the package of employee benefits.

When it enacted ERISA and the amendments thereto, Congress drew a bright line of **when** and **how** an employer may permissibly consider the costs of providing health and welfare benefits.[7] Thus, §510 prohibits an employer from achieving a change in employee benefits by "discharg[ing]" or otherwise "discriminat[ing]" against its employees for "exercising any right" under a plan "or for the purpose of interfering with the attainment of any right to which the [employee] may become entitled under the plan". The clarity of the duties imposed by §§510, 515, and 4212(c) of ERISA is such that Respondents and *amici* must direct their policy arguments to Congress. *Advanced Lightweight Concrete*, 484 U.S. at 551.

Respondents' "policy" argument that recognition of a §510 cause of action under the facts pleaded in this case "provide[s] such a powerful disincentive to the creation of welfare benefit plans" (Santa Fe Br. at 12) is wholly unsupported by the record, legislative history or any other authority. That argument could be advanced to eliminate all of the duties and obligations imposed by Congress on employers in ERISA. Indeed, in enacting §510 and the 1980 amendments to ERISA Congress created a powerful incentive for employers to honor their promises to employees to maintain benefits at the level set in the multiemployer plans which exist for the duration of the CBA. Respondents improperly look to this Court to change the words and sound policies of ERISA.

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[7] If the employer found mid-contract that it was losing money and could not afford the benefit levels set by the CBA, the duties and rights imposed by ERISA and the NLRA require the employer to bargain with the employees' representative to reach a mutually agreeable change in the benefits package. Neither ERISA nor the NLRA grant to the employer the unilateral right to alter the package of benefits provided under a multiemployer plan by simply subcontracting its work to a successor that can negotiate a lower package of benefits and refuse to hire the employees who worked for the predecessor.

III.

RESPONDENTS READ THE "ATTAINMENT" CLAUSE OF §510 TOO NARROWLY IN LIGHT OF ITS BROAD LANGUAGE AND THE BROAD REMEDIAL PURPOSES OF ERISA.

The Railroad Respondents and their *amici* seem to argue that the only application for the "attainment clause" of §510 is if an employer discharged or discriminated against an employee when the employer knew that the employee or beneficiary was ready to make a health insurance claim (Resp. *Amici* Br. at 17) or was about to "reach that threshold of eligibility in order to avoid the expense of that benefit" (Santa Fe Br. at 17-18).[8] Nothing in the intent, purpose or language of the statute compels that any such restrictive gloss be implied. Moreover Respondents and their *amici* avert from the principle that not every possible application of a statute need be mentioned by Congress. *Moskal v. U.S.*, 498 U.S. 103, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990).

The second clause of §510 prohibits adverse employment actions undertaken **"for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan"** (emphasis added). In *Varity* this Court repeated Congress' intent that ERISA provide "broad remedies for redressing or preventing violations" of the statute, and that it enacted

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[8] The members of IMREA were all eligible to make Teamsters health and welfare benefits claims at the time of their discharge. ATSF in effect argues for the anomalous result that, once the employees had attained eligibility for benefits, the employer could discharge them in order to reduce its health and welfare liabilities. That continuation coverage may be available to employees after discharge pursuant to the COBRA amendment to ERISA, 29 U.S.C. §§1161 *et seq.*, is immaterial to the illegality of the employer's conduct under §510, despite what ATSF suggests (Santa Fe Br. at 35 n.21). COBRA coverage is not the same as employer-provided group health insurance. COBRA does not compel continuation coverage of other employee welfare benefits covered by ERISA such as vacation and sick pay, 29 U.S.C. §1002(1).

ERISA "to protect ... the interests of participants ... by establishing standards of conduct, responsibility, and obligation ...". 116 S.Ct. at 1078, *quoting* 1 Leg. Hist. at 621 and §2(b) of ERISA. In light of the broad purposes of ERISA, the Court resoundingly declared that the action of Congress in specifically prohibiting certain acts and conduct should not be construed as any intent to limit the scope of ERISA. *Id.* at 1077-79. Contracting away work and discharging employees for the purpose of lowering benefit levels prevents employees from retaining their eligibility to make claims for health and welfare benefits for the duration of the multiemployer plan in effect at the time of discharge. Respondents ignore that every discharged employee was covered by a multiemployer plan, and not through an employer's health insurance program. So the Santa Fe's contribution levels for any increasing benefits would have arisen only at the time of negotiating a new CBA. Thus their self-justification falls under the weight of the facts clearly known to them.

ATSF argues that Congress should have added specific language to the attainment clause if it intended it to have the plain meaning Petitioner and the Government avow (Santa Fe Br. at 32-33). When interpreting federal statutes this Court has never held that Congress was required to list each and every specific prohibited act. *See Moskal v. U.S.*, 498 U.S. at 111. In enacting §510, Congress expressed the intent that it would prohibit any employer action designed to interfere with the attainment of rights under a benefit plan, including such acts as "constructive" discharge (where the employee resigns employment because the employer made it so uncomfortable) even though the specific discriminatory act was not listed in the statute. 120 Cong. Rec. 737, *reprinted in* 2 Leg. Hist. 1774-5, and 1974 U.S.C.C. & A.N. 5177, 5188 (statements of Sen. Williams).

Respondents' reliance (Santa Fe Br. at 19-28) on ERISA's legislative history is equally unavailing. Notwithstanding Respondents' exhaustive chronology of the bills that became ERISA, they point to nothing that supports their construction of the term "attainment" as a limiting factor in §510's interpretation. There is affirmative indication in the legislative history as well that the provision precludes interference with the attainment of other rights.

Respondents are in error in contending (Santa Fe Br. at 21) that the initial Senate bill, S.4, related only to pension plans and thus the attainment clause as initially enacted could only have been intended to protect benefits capable of vesting. The precursor of §510 – §610 of S.4 – appeared in Title VI of S.4, and that title of the bill applied to pension plans, profit-sharing plans, and any plan covered by the Welfare and Pension Plans Disclosure Act (WPPDA). *See* S.4, §104(d), §610, *reprinted* in 1 Leg. Hist. at 506, 585. The WPPDA, as its name suggests, applied to both pension and welfare benefit plans. Pub. L. 85-836, 72 Stat. 998.

This Court, in *Robinson v. Shell Oil Co.*, No. 95-1376, 65 U.S.L.W. 4103 (U.S., Feb. 18, 1997), unanimously refused an invitation to require extensive definition of "employee" in Title VII. Justice Thomas wrote that such narrow reading of that statute "would effectively vitiate much of the protection" offered by the law and would "provide a perverse incentive for employers to fire employees". *Id.* at 4105. The Court found "persuasive force" for interpretation of the statute in arguments whose "coherence and ... consistency with a primary purpose of the anti-retaliation provisions: maintain[ed] unfettered access to statutory remedial mechanisms". *Id.* at 4105. Similar considerations here should persuade the Court to reject Respondents' and *amici's* extremely narrow interpretation.

Moreover, Respondents' "attainment" argument provides no textual support for its theory that §510 cannot apply to employment actions taken in the context of operational changes or cost-cutting "fundamental business decisions". There is nothing in the concept of "attainment" or in §510 that limits the provision's scope to individual employment decisions or precludes its applicability to the treatment of a class of employees, such as those working in an organizational unit. *Gavalik*, 812 F.2d at 853, 857 (upholding class claim under §510). Rather, the focus is upon whether employment decisions are carried out with the improper purpose of interfering with the attainment of benefits. *Cf. Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir.), *cert. denied*, 510 U.S. 916, 114 S.Ct. 308, 126 L.Ed.2d 255 (1993) ("[t]he validity of a §510 claim ... hinge[s] ... upon the purpose of the discharge").

IV.

RESPONDENT AND ITS *AMICI'S* ARGUMENT THAT §510 NARROWLY APPLIES ONLY TO DISCRIMINATION AGAINST INDIVIDUAL OR IDENTIFIABLE PARTICIPANTS HAS NO SUPPORT IN THE STATUTE.

Respondents' *amici* argue that §510 can prohibit only discriminatory employment practices "targeting individual employees" to "prevent identifiable participants from attaining specific benefit rights" (Resp. *Amici* Br. at 13-14). In their next breath, however, *amici* admit that "more than one participant could be targeted for the same reason, and a group of such participants may assert their claims in a single action" (Resp. *Amici* Br. at 14). *Amici* cite no provision in the statute or the history of ERISA which would justify their "targeting" proposal. In *Varity* this Court made it clear that ERISA can prohibit an employer from harming large groups of its employees for purposes of fulfilling an improper business plan.

The courts never have required Congress to word anti-discrimination statutes in the singular and plural to protect groups of employees from employer conduct designed to discriminate against multiple employees. Thus, the ADEA and Title VII both prohibit employers from adopting workforce reduction plans with the intent to discriminate against employees on the basis of their status. *See Armbruster v. Unisys Corp.*, 32 F.3d 768 (3rd Cir. 1994) and *Bell v. AT & T*, 946 F.2d 1507, 1510 n.1 (10th Cir. 1991). Like §4(a) of the ADEA (unlawful to discriminate against "any individual") and §703(a) of Title VII (unlawful to "discriminate against any individual") §510 of ERISA identifies those protected in the singular ("participant" and "beneficiary").

ITS argues that Respondents did not discriminate against the members of Petitioner Association because Santa Fe treated all its Teamsters employees the same – the Railroad subcontracted out their work, terminated them, and forced them to seek employment from a successor which lowered their contractual level of benefits (ITS Br. at 21). ITS' unsupported conclusion of no disparate treatment ignores that Petitioner has not alleged the Railroad Respondents

changed the benefit levels of the other persons at the Hobart Yard such as the switchmen, brakemen, engineers, and the like. Looking at the railyard as a whole, under the inferences reasonably taken from the Complaint, Respondents treated the Teamsters-represented employees different from the other ATSF employees in order to discriminate against them for the purpose of interfering with their right to attain benefits. *See Hishon v. King & Spaulding*, 467 U.S. 69, 75, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

In arguing (Santa Fe Br. at 11-12) that Petitioner's interpretation of §510 prevents employers from taking benefit costs into account in making important operational decisions, Respondents overstate the breadth of our interpretation and distort the effects of a ruling in IMREA's favor. *See, e.g.*, Santa Fe Br. at 12 ("if Petitioner is correct, an employer who decides to close one plant rather than another or to scale back operations at one plant rather than another would violate §510 if the higher costs at the affected plant were attributable to welfare benefits"). In order to establish a violation of §510, a plaintiff must prove that her employer undertook the employment action at issue with specific intent to interfere with the attainment of benefit rights; it does not suffice to show that the loss of benefits was the consequence of her discharge.[9] *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 979-80 (5th Cir. 1993); *Seaman v. Arvida Realty Sales*, *supra*, 985 F.2d at 546; *Gavalik v. Continental Can Co.*, *supra*, 812 F.2d at 853. Moreover, as part of her *prima facie* case, §510 a plaintiff must submit evidence showing such a specific intent to interfere with the attainment of benefits. *Gavalik*, 812 F.2d at 853. This specific intent requirement defuses Respondents' argument (Santa Fe Br. at 14) that our interpretation

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[9] The allegations in the Complaint, which must be taken as true at this stage of the proceeding, clearly allege a specific intent to deprive Petitioner of the attainment of ERISA-covered benefits. *See* Pet. Writ. App. IV at 30a, ¶37 ("defendants in violation of 29 U.S.C. §1140, agreed and conspired to intentionally interfere with plaintiff's employment relationship and legitimate expectancy of continued employment for the express purpose of depriving plaintiff of most, if not all of the substantial, ERISA-protected "fringe" benefits of their employment with SFTS, as alleged in the proceeding paragraphs").

"will convert every cost-cutting operational change into a federal lawsuit in which the defendant will effectively have the difficult burden of proving that it did not act with the supposedly improper intent". *Cf. Seaman*, 985 F.2d at 546 (specific intent component of §510 "defuses the argument that §510 protection will turn every discharge into a §510 violation").

In a "contracting-out" situation, assuming no contractual or other legal duty to continue paying benefits, a mere showing that the employer wished to cut costs without more proof would not ordinarily establish that its discharge of employees via the contracting-out process was motivated by a specific purpose to interfere with their attainment of benefits rights, within the meaning of §510. The inquiry in such a hypothetical would focus on whether the employer can establish why discharge was required in lieu of plan amendment, for example, or the *bona fide* nature of the cost-cutting. An employer does not necessarily have a specific intent to violate §510 by entering into an arms-length agreement to contract-out work based on an attractive price offered by a contractor. But where the contractor is not at arm's length, or where the contractor's ability to do the work at the attractive price reflects in a substantial sense no more than the lower benefits that the contractor will pay the employees taking over the work, then the specific intent may be inferred. An employer's decision to discharge and contract out in such circumstance (rather than amend its plan) is far more indicative of a prohibited motive than of legitimate desire to save costs. Moreover, even though an employer, in comparing its costs to a contractor's *bona fide* bid, undoubtedly takes into account its own labor costs attributable to benefits, that consideration generally will not negate any specific intent to deprive its employees of benefits. This is especially true when the new contract's savings reflect substantially no more than the cost of the benefits avoided. Section 510 thus does not prohibit an employer from considering its labor costs and seeking to reduce them, so long as it does not take adverse employment actions or, when it does, those adverse employment actions are not taken for the specific purpose of interfering with employees' attainment of benefits.

In a case such as this, where the employer and contractor prearranged that the contractor would hire (or rehire) its employees with lower benefits, the inference arises that the employer undertook the employees' discharge for the specific purpose of interfering with the employees' attainment of benefits. Such a case is qualitatively worse than an employer who discharges an individual who is about to vest and replaces him with a new individual who will not vest for years (which Respondents concede (Santa Fe Br. at 18) is the paradigm of a §510 violation). In each case the employer discharges an individual for the purpose of replacing him with someone who is ineligible for benefits. The fact that the employer has taken such action as to a group of individuals does not affect the appropriate inquiry under the statute – whether the action was taken for the purpose of interfering with employees' attainment of benefits.

V.

ITS' ARGUMENT THAT RESPONDENTS HAVE NO LIABILITY UNDER §510 OF ERISA RESTS ON A FAULTY ASSUMPTION ABOUT CONDUCT PERMITTED BY THE NLRA.

ITS argues that Respondents have an affirmative defense to Petitioner's §510 claim in that the conduct of Respondents supposedly was permissible under the NLRA. Petitioner concedes the existence of no affirmative defense [under the NLRA] to this claim under ERISA. Moreover, it is not clear whether the NLRA permitted Respondents' conduct or if those actions constituted unfair labor practices.

Because conduct may not violate the NLRA does not mean that employees are precluded from pursuing remedies independent of the NLRA. *Cf. Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 736-37, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981). This Court has repeatedly held that simply because conduct may constitute an unfair labor practice does not restrict remedies under state or other federal laws. *See, e.g., Farmer v. Carpenters*, 430 U.S. 290, 304, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) (state law claim for intentional infliction of emotional distress permissible even though same

conduct could constitute an unfair labor practice) and *Advanced Lightweight Concrete Co., supra*, 484 U.S. at 550-53 (ERISA §515 provides remedies for employers failure to make contributions to multiemployer benefit plan under existing CBA even though conduct also is an unfair labor practice). That the Railroad Respondents' failure to bargain over the change in the terms and conditions of employment may or may not have violated the NLRA thus has no effect on Petitioner's ERISA rights to a remedy for the discharge and discrimination undertaken for the purpose of interfering with their health and welfare benefits.

ITS incorrectly argues that ATSF's subcontracting of the inter-modal work performed by the employees represented by the Teamsters union, while an existing CBA between SFTS and the Teamsters was in force, was "expressly permitted" by the NLRA (ITS Br. at 16).[10] Petitioner did not allege and Respondents presented no evidence that the Railroad Respondents attempted to bargain with the Teamsters over their desire to reduce the employee benefits provided to the inter-modal workers. Likewise, Petitioner did not allege and no Respondent presented any evidence that the Railroad Respondents attempted to bargain with the Teamsters over the Railroad's decision to subcontract this work to a non-railroad employer. ITS acknowledges that an employer like Santa Fe has a duty under the NLRA to bargain about subcontracting when the employer's motive is to lower its labor costs (ITS Br. at 11-12, *citing Fibreboard Paper Products v. N.L.R.B.*, 379 U.S. 203, 213-14, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964)). Thus, on the record before the Court Respondents' conduct was not protected by the NLRA.

The purported legality under the NLRA of Respondent ITS' conduct as a successor employer is likewise a question not susceptible of resolution on this record. ITS acknowledges that "in most cases" (but not all) a successor employer is free to set the initial terms and conditions of employment after negotiating with the

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[10] Interestingly, neither of the Railroad Respondents even attempted to claim that their actions complied with the NLRA or the LMRA. Indeed, the Railroad Respondents did not address this issue in their joint brief.

employees' existing union representative. *N.L.R.B. v. Burns International Security Services*, 406 U.S. 272, 294, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972) ("a successor employer is **ordinarily** free to set initial terms on which it will hire the employees of a predecessor") (emphasis added). ITS' illegal conduct pleaded in the Complaint was to conspire with the Railroad Respondents to violate §510 of ERISA by agreeing to perform the same work at the same place with the same equipment and employees, but to force the employees to accept (on pain of unemployment) benefits lower than those provided in the existing CBA (Writ Pet. App. at p. 24a-30a). At this stage the Court cannot resolve the question of whether forcing these employees to accept lower benefits than in their contract constituted **good faith** bargaining by a successor employer. *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 42-3, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987) and *N.L.R.B. v. Ins. Agents' Int'l. Union*, 361 U.S. 477, 484-85, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960).

Nothing in the Complaint or the briefs of Respondents shows that the Railroad Respondents attempted to bargain over any supposed need to reduce the level of employee benefits before contracting away these Teamsters' work. Although it is immaterial here whether Santa Fe's failure to bargain breached their obligations under the NLRA, such could be evidence of improper motive and intent for the §510 claim. Material fact questions exist on whether Respondent ITS, the sham successor "employer" (it took over this inter-modal work at the Hobart Yard with most of the same employees and the same equipment, as alleged in the Complaint) bargained in good faith over the terms and conditions of employment. Whether that was an unfair labor practice by Santa Fe and/or ITS is likewise legally immaterial to these ERISA claims. Also immaterial here as a matter of ERISA law is ITS' claim to have committed no unfair labor practices. But one must observe that conspiring with an employer to aid it in committing an unfair labor practice – unilaterally changing the terms and conditions of employment – hardly sets up any conflict between the NLRA and ERISA §510.

CONCLUSION

The Court should reverse the part of the Ninth Circuit's ruling that upheld the dismissal of Petitioner's claim under §510 of ERISA for interference, by discharge from their employment with SFTS, with the rights of IMREA's members to receive and make claims for health and welfare insurance benefits, and remand the case to the District Court for trial in accordance with the Court's decision.

Respectfully submitted,

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